

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Petition for Declaratory Ruling on
Issues Contained In Count I of:

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 97-1859-C.V.-T-26C

JAMES J. WHITE, PERRY KRANIAS,
RALPH DELUISE and WALL STREET
CONNECTIONS, INC.

Representative Plaintiffs,

vs.

GTE CORPORATION; GTE WIRELESS
INCORPORATED f/k/a GTE MOBILNET
INCORPORATED; GTE WIRELESS OF
THE SOUTH INCORPORATED f/k/a
GTE MOBILNET OF THE SOUTH
INCORPORATED; GTE MOBILNET OF
TAMPA INCORPORATED; GTE WIRELESS
OF HOUSTON INCORPORATED; GTE
MOBILNET OF CLEVELAND INCORPORATED
and GTE MOBILNET OF THE SOUTHWEST
INCORPORATED,

Defendants.

CLASS ACTION COMPLAINT

WT 00-164

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY OF PETITIONERS TO OPPOSITION OF GTE CORPORATION,
GTE WIRELESS INCORPORATED, GTE WIRELESS OF THE SOUTH
INCORPORATED, GTE MOBILNET OF TAMPA INCORPORATED,
GTE WIRELESS OF HOUSTON INCORPORATED, GTE MOBILNET
OF CLEVELAND INCORPORATED, AND GTE MOBILNET
OF THE SOUTHWEST INCORPORATED

COME NOW, the Petitioners, Plaintiffs in WHITE vs. GTE, United States District Court for the Middle District of Florida, Case No. 97-1859-C.V.-T-26C (hereinafter referred to as the "GTE Class Action", with the Defendants therein being hereinafter collectively referred to as "GTE") through the undersigned counsel, and hereby file this, their reply to the Opposition of GTE, filed under Certificate of Service dated February 10, 2000. In their "Summary of Opposition", GTE asked the Federal Communications Commission ("the FCC" or "the Commission") to deny the Petition for Declaratory Ruling filed by Petitioners. GTE misstates the issues raised by the Petition as follows:

1. GTE indicates that Petitions have requested the Commission to declare that certain aspects of GTE's commercial mobile radio service ("CMRS") rates and rate structure, including its practice of billing in whole-minute increments, are unjust and unreasonable under Section 201(b) of the Communications Act of 1934, as amended ("the Act"), 47 USC §201(b). GTE falsely alleges that the Commission has already conclusively determined this issue based on the order rendered "In the Matter of Southwestern Bell Mobile Systems, Inc.", FCC 99-356. ("Southwestern Bell"). However, the rates and practices at issue "In the Matter of Southwestern Bell Mobile Systems, Inc." were not identical to those at issue here. Specifically, that opinion and order addressed the CMRS industry's practice of rounding up all phone calls to the next minute for billing purposes and the practice of charging for in-coming calls. Both practices were deemed rate practices in the ruling and were found to be not unjust or unreasonable under Section 201(b), *per se*. (Emphasis provided by the Commission)¹.

¹ "In the Matter of Southwestern Bell Mobile Systems, Inc.", FCC 95-356, Memorandum and Order, paragraph 14, page 7.

2. In the same opinion, however, the Commission carefully pointed out that,

“we conclude only that the charging in whole-minute increments and charging for in-coming calls are not in themselves “unjust or unreasonable” in violation of the Section 201(b) of the Act. In this regard, we emphasize that if a carrier employs unreasonable practices, the carrier may be found to be violation of Section 201(b), even if the rates and rate structures themselves are not unreasonable. We do not conclude that the implementation of these industry practices by CMRS providers will necessarily be lawful under Section 201 (b) of the Act in all circumstances, and without regard to other contractual, service, and marketing practices of the CMRS provider”.²

3. Also, in the Southwestern Bell Memorandum Opinion and Order, the Commission refused to issue a ruling that the term “call initiation” as used in the CMRS industry refers to the CMRS customer activating his or her phone, that is, by pressing the “send” button, and whether or not the initiation and termination of a call is the same no matter whether the call is an in-coming or and out-going call.³ In the GTE class action, rounding up is defined as:

“Charging cellular phone customers in whole minute increments, without fractions, and at all times such charges (I) are measured from the time the “send” (or other similarly named button) is pushed, (ii) include time for “unconnected calls” (where no one responds after a certain period of time or after a number of attempts within a short period of time), and (iii) are “rounded up” to the next minute”⁴

4. It is further alleged that the regular monthly bills provided to GTE’s cellular phone customers do not disclose or explain GTE’s practice of rounding up. Count I of the Third Amended Complaint is the Count which the Honorable Richard A. Lazzarra, the judge presiding over the GTE

² Id, paragraph 15 at page 8.

³ Id, paragraphs 16 and 17 at page 8.

⁴ See Third Amended Complaint, paragraph 14 at page 4

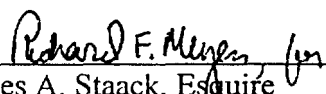
class action, has referred to the Commission, based on finding that the Commission has primary jurisdiction to determine the "rounding up" issue raised by Count I. "Rounding up", as defined in the GTE class action, is an unreasonable or unjust billing practice and, therefore, unlawful under the provision of Section 201(b) of the Act. In the Southwestern Bell petition, "rounding up" was not so defined. Therefore, the issues raised are different in the GTE class action than the issues raised in the Southwestern Bell petition and, accordingly, the Commission's ruling in the Southwestern Bell is not controlling. Accordingly, the Petition for Declaratory Ruling should be granted and the Commission should find that GTE's practice of undisclosed charges for dead time, unconnected calls, for the time being measured from the "send" button where no call is occurring under the plain meaning of a telephone call, where all such calls are rounded up to the next minute, including dead time and time from the "send" button, is an unreasonable or unjust billing practice and violative of Section 201(b) of the Act.

5. GTE and its counsel seek to cloud the specific issues raised in the Petition by undertaking to argue that the Petition seeks to ask the Commission to review the entire record in the Federal Court proceeding and issue a ruling that petitioners' state law claims for relief are not preempted by Section 332(c)(3) of the Act, 47 USC §332 (c)(3). Apparently, GTE wishes to steer the Commission to focus on the issues raised in the matter of Petition of the Wireless Consumers Alliance, Inc. for Declaratory Ruling concerning whether the provision of the Communication's Act of 1934, as amended, or the jurisdiction of the Federal Communications Commission thereunder served to preempt state courts from awarding monetary relief against commercial mobile radio service (CMRS) providers for: (a) violating state consumer protection laws prohibiting false advertising and other fraudulent business practices, and/or (b) in the context of contractual disputes

and tort actions adjudicated under state contract and tort law. That petition deals with Section 332 of the Act which denies states' authority to regulate the rates charged for any CMRS service. As we understand the theory of this particular petition, the CMRS industry hopes to avoid actions undertaken to protect the interests of consumers based on theories of tort and contract in the context of their customer relationship with CMRS providers by requesting the Commission find that an award of damages by a state court for egregious conduct on the part of CMRS providers is to be likened to some sort of regulation of rates which would be preempted by Section 332(c)(3) of the Act.

6. The instant petition specifically limits the requested declaratory finding to the issues contained in Count I of the Third Amended Complaint. Count I of the Third Amended Complaint is very narrow and the issue is as stated above. Accordingly, the opposition as filed by GTE should be ignored by the Commission to the extent that it addresses this rate issue.

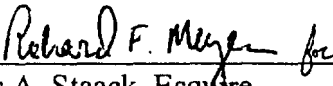
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Accept Late-Filed Reply to Opposition of GTE Corporation, et al., to Plaintiffs' "Petition for Declaratory Ruling", has been served to: **James M. Landis, Esquire**, FOLEY & LARDNER, 100 North Tampa Street, Suite 2700, Tampa, FL 33601; **Peter Kontio, Esquire**, ALSTON & BIRD LLP, One Atlantic Center, 1201 West Peachtree Street, Atlanta, GA 30309-3424, **Andre J. Lachance**, GTE Service Corporation, 1850 M Street, N.W., Washington, DC 20036; and **Frederick M. Joyce, Esquire**, ALSTON & BIRD LLP, 601 Pennsylvania Avenue, NW, North Building, 11th Floor, Washington, DC 2004-2601, by U.S. Mail, this 3RD day of March, 2000.



James A. Staack, Esquire

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